General Merchandise Distributors, Inc. *and* General Drivers, Warehousemen and Helpers Local Union 745, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 16-RC-8360

September 8, 1982

DECISION, DIRECTION, AND DIRECTION OF SECOND ELCTION

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

Pursuant to a Stipulation for Certification Upon Consent Election, a secret-ballot election was conducted on July 9, 1981, among the employees in the stipulated unit. The tally of ballots furnished the parties shows that 22 ballots were cast for, and 21 ballots were cast against, representation by Petitioner. There were two challenged ballots, a number sufficient to affect the election's results.

Both parties filed objections to conduct affecting the results of the election and, following an investigation, the Regional Director issued a report and notice of hearing on certain of said objections and on issues raised concerning the challenged ballots.[1] A hearing was conducted on August 27 and 28 and September 15 and 16, 1981.

On November 2, 1981, the Hearing Officer issued his Report on Objections and Challenges in which he recommended that the parties' objections be overruled in their entirety and that the challenged ballots be opened and counted. The Employer and the Petitioner filed exceptions to the Hearing Officer's report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's report and the exceptions and briefs and hereby adopts the Hearing Officer's findings, conclusions, and recommendations, only to the extent consistent herewith.[2]

In its Objection 10, Petitioner contends that the Employer interfered with the election by granting employees certain benefits shortly before the election. We agree. When new benefits are granted within the critical preelection period, it is the Employer's burden to demonstrate that neither the decision to grant the benefits itself, nor the timing of its implementation, was designed to influence votes.

Here, it is undisputed that, within 1 week of the election, the Employer began construction of a baseball field and backstop on a lot adjacent to its plant. Furthermore, Petitioner presented uncontroverted evidence showing that the Employer interrupted the scheduled vacation of one of its maintenance employees so that construction of the baseball field could start when it did. Thus, absent some other explanation for the urgency of its actions, and none was offered, the inference is warranted that the Employer was engaged in an attempt to influence the outcome of the election. Nevertheless, the Hearing Officer excused the Employer's actions in this regard, positing that the Employer might have felt compelled to initiate construction prior to the election lest it be charged with withholding an expected benefit from employees. We find nothing in the record to support such a notion.

The testimony of the Employer's own witness, Human Resources Director James Souther, reveals that this is not a case where the decision to grant a benefit was made and announced prior to the advent of a union campaign. Rather, Souther admitted that he formed a sports steering committee in April or May, well after Petitioner's organizing campaign had begun, and then proceeded to solicit the committee's suggestions for a sports program. Furthermore, while it is true that the committee responded by suggesting that the Employer sponsor a team in an intracity baseball league, we fail to see how this sequence of events can in any way serve to legitimatize the Employer's later decision on the eve of the election to begin construction of a baseball field on its own property. Rather, it is evident to us that what occurred here was a calculated effort to influence votes by the well-timed grant of a benefit that was tailor-made to meet with employee approval.

We similarly reject the Hearing Officer's conclusion that the Employer was not attempting to influence the election when it purchased picnic tables and installed them at the plant just 2 weeks before the election. According to Souther, the decision to purchase picnic tables was made sometime in April, about 1 week after another Souther-formed employee committee had requested them. This explanation, of course, was no explanation at all unless the Employer could account for suddenly taking action a few weeks before the election based on a decision that was made months earlier. On this

[1] A hearing was directed only as to Petitioner's Objections 1, 3, 4, 7, 8, 9, 10, 11, 12, and 15, Employer's Objection 1, and the challenged ballots of Betty Russell and Mary L. LaFerney.

[2] In the absence of exceptions thereto, the Board adopts, *pro forma*, the Hearing Officer's recommendation that Petitioner's Objections 1, 3, 7, 8, 9, 11, and 12 be overruled.

In adopting the Hearing Officer's recommendation that the Employer's objection be overruled, Chairman Van de Water and Member Zimmerman rely on *Midland National Life Insurance Company*, 263 NLRB 127 (1982). Member Fanning does not rely on *Midland National*, but reaches the same result under the standards delineated in *Hollywood Ceramics Company*, 140 NLRB 221 (1961).

score, Souther explained that securing bids on the picnic tables had been a low priority item subordinated to the press of meeting production, when shortly before the election, immediate action was ordered by Division Manager Duane Anderson. Souther also testified that Anderson explained this order by pointing to a problem with trash accumulating in the plant's driveway where employees often lunched. While the Hearing Officer credited Souther, we do not regard this hearsay account of what Anderson said as probative evidence concerning the issue which these facts present. We have no evidence as to whether Anderson's announced concern over the trash problem and his abrupt reversal of priorities had anything to do with the imminency of the election and a desire to influence votes. Without any testimony from Anderson, we infer from the facts before us that it did, and find that here too the Employer failed to meet its burden of justifying a last-minute grant of benefit.

Finally, we cannot accept the Hearing Officer's characterization of the Employer's preelection conduct described above as the innocuous continuation of an existing policy. At best, the Employer husbanded benefits to spring them on employees in a last-minute effort to influence votes. Such behavior is anathema to employee free choice in the elections we conduct and to the policies of the Act which it is our job to enforce. Accordingly, we sustain Petitioner's Objection 10.

In its Objection 4, Petitioner contends that the Employer told employees that bargaining would start from "scratch" and thereby impliedly threatened that employees would lose benefits as an immediate consequence of voting for unionization. Human Relations Director Souther specifically denied making the bargaining-from-scratch remarks attributed to him by Petitioner's witnesses, claiming instead that:

> I believe it was the . . . June 30 meeting . . . and someone asked a question, "Would we keep what we got?" or "Would we lose all that we've got?" and Duane Anderson just quickly said, "Well, when we start bargaining, we just start from nothing." And I immediately said to the group, "Everything of an economic nature becomes negotiable if we are organized. I can't tell you where we will start and where we will end. Everything becomes negotiable." I said that right behind what Duane Anderson said, I disagreed with what he had told them.

Finding that "Souther testified in a highly credible manner," the Hearing Officer concluded that "his remarks did not lead the employees to believe that selection of a union would result in a loss of benefits" and that "Duane Anderson's remarks did not, under the circumstances, amount to objectionable conduct." We cannot agree, even though we accept Souther's testimony and take as implicitly discredited the starting-from-scratch remarks attributed to Souther by Petitioner's witnesses.

We note at the outset that Duane Anderson flat out told the employees "Well, when we start bargaining, we just start from nothing" and that it was Anderson, and not Souther, who was the most senior company official at this facility. Further, Souther's testimony does not indicate that he repudiated what Anderson had just said or that he assured employees that they would not start out with a loss of benefits if they opted for unionization. On the contrary, looking to the totality of Souther's testimony concerning the June 30 meeting, and not just to the above-quoted exchange, it is clear to us that Souther himself expressly put employees on notice that the price of unionization would indeed be the immediate loss of at least one significant benefit. Thus, in announcing at this meeting that an adjustment in wage rates was planned for shortly after the election, Souther admittedly told the employees that the raises would be given according to schedule "as long as . . . we had control [and] didn't have to negotiate pay." Further, lest his messages be missed, Souther pointed out that another group of employees had gone a full year without any raises after opting for union representation and were still waiting for a contract to be negotiated.[3]

In sum, it is clear to us that the Employer interfered with the election by threatening employees with an immediate loss of benefits if they opted for unionization and that the threat was made all the more ominous by Souther's statements to the effect that all economic matters were negotiable. Indeed, taken in context, Souther's statement could only have left employees with the distinct impression that a long time would have to pass before lost benefits would be restored, if at all, through the negotiating process as Souther depicted it.

DIRECTION

It is hereby directed that the Regional Director for Region 16 shall, pursuant to the Rules and Regulations of the Board, within 10 days of this Decision and Direction, open and count the ballots cast

[3] In passing upon another of Petitioner's objections, the Hearing Officer noted that "there was no credible testimony that the Employer conditioned granting the raises on the outcome of the election." We take this observation to mean only that Souther did not entirely foreclose the possibility that, if Petitioner were voted in, the raises planned for shortly after the election might at some later point be received by the employees. No other construction can be squared with Souther's testimony, described-above, which was corroborated and embellished by other witnesses but contradicted by none.

by Betty Russell and Mary LaFerney, and prepare and cause to be served on the parties a revised tally of ballots, including the count of said ballots. In the event that the revised tally of ballots shows that the General Drivers, Warehousemen and Helpers Local Union 745, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has received a majority of the valid votes cast, it is directed that the Regional Director shall issue the appropriate Certification of Representative.

However, in the event that the above-named labor organization does not receive a majority of the valid votes cast, it is directed that the Regional Director set aside the election in Case 16–RC–8360, and direct a second election to be conducted at such time as he deems it appropriate to do so. In such event, the following shall be applicable:

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

CHAIRMAN VAN DE WATER, dissenting in part:

Contrary to my colleagues, I would adopt the findings and recommendations of the Hearing Officer with respect to Objections 4 and 10. I find nothing sinister in the timing of the construction of the baseball diamond or the installation of picnic tables at the plant. It is clear that both of these benefits were the result of suggestions made by employee committees and had their origin several months earlier. The Petitioner does not claim that the formation of the employee committees was improper. The law does not require that the Employer cease responding to employee suggestions upon the filing of a petition. As explained by the Hearing Officer in his report, the Employer's facility had been in operation only a short period of time before the formation of employee committees, which committees discussed several possibilities for improving conditions at the plant. Prior to the filing of the petition, a basketball goal was erected. The changes following the filing of the petition appear to be further steps by the Employer to respond in a like manner to employee suggestions. I would not find that the Employer interfered with the election merely by continuing to respond to employee needs and desires.

With regard to Objection 4, I find, in agreement with the Hearing Officer, that the remarks of Anderson and Souther, if taken in context, did not lead the employees to believe that selection of the Union would result in a loss of benefits. Souther very clearly explained that economic items are subject to negotiation. Consequently, I do not find the comments herein objectionable.